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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: JUL 28 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an importer and wholesaler of diamond tools and equipment. It seeks to employ the beneficiary permanently in the United States as a warehouse operations specialist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was certified by the Department of Labor.

The director determined that the ETA Form 9089 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director additionally noted that no evidence of the petitioner's ability to pay the proffered wage was submitted and denied the petition accordingly.

On appeal, the petitioner merely states that additional documents will be submitted to the AAO within 30 days. The only documentation received to the record is a duplicate of an employment verification letter contained in the underlying record. The petitioner submits no evidence relevant to the director's basis for denial.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. For the reasons discussed below, we find that the director's conclusion is supported by the record and by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**

The regulation at 8 C.F.R. § 204.5(g)(2) additionally states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Here, the Form I-140, Immigrant Petition for Alien Worker was filed on April 7, 2008. On Part 2.d. of the Form I-140 petition, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

In this case, Part H.4 and H.4B of the job offer portion of the ETA Form 9089 indicate that the minimum level of education required for the position is a Bachelor's degree in Business Administration. H.5 states that no training is required. H.6 and H.6A state that 60 months of experience in the job offered as a warehouse operations specialist is required. H.8, H.8A and H.8C state that the employer will accept an alternate combination of education and experience consisting of completion of a high school education and 18 years of experience in the job offered. H.9 indicates that a foreign educational equivalent will be accepted.

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp.

829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

Thus, where experience is not a consideration, the minimum education is a U.S. degree above that of a baccalaureate of the foreign equivalent. Here, the alternate minimum level of education and experience was expressed as a high school education and 18 years of experience. Because this alternative minimum requirement is not equivalent to an advanced degree, the position does not require a member of the professions holding an advanced degree. Therefore, the job offer portion of the individual labor certification, fails to demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability, and the petition may not be approved on this basis. 8 C.F.R. § 204.5(k)(4).

Further, as noted by the director, the petitioner submitted no evidence of its continuing ability to pay the proffered wage of $28.30 per hour ($58,864 per year) as of the priority date of January 7, 2008, onward. A petitioner is required to submit evidence of its ability to pay the proffered wage in compliance with the regulation at 8 C.F.R. § 204.5(g)(2). The petitioner must demonstrate the continuing ability to pay the proffered wage as of the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. The petitioner must also demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

Beyond the decision of the director, it is noted that the record fails to corroborate that the beneficiary has knowledge of office related computer software (Excel, Word, Internet, etc.) as required by the labor certification in H.14 of the ETA Form 9089. This knowledge must be established as of the priority date of January 7, 2008.[1] An application or petition that fails to comply with the technical

[1] The regulation at 8 C.F.R. § 204.5 also provides in pertinent part:

> (g) *Initial Evidence*—(1) *General.* Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in

requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143 at 145 (recognition of the AAO's *de novo* authority).

The evidence submitted does not establish that the ETA Form 9089 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and fails to demonstrate that petitioner has the continuing ability to pay the proffered wage. Further, the record fails to establish that the beneficiary acquired the knowledge required by H.14 of the ETA Form 9089 as of the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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this section. . . Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.